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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 200

JACK P. F. GREMILLION, ET AL., APPELLANTS

v.

EARL BENJAMIN BUSH

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

MOTION TO AFFIRM

Pursuant to paragraph 1(c) of Rule 16 of the Revised Rules of this Court, the United States of America moves that the judgment of the district court be affirmed.

QUESTIONS PRESENTED

1. Whether the three-judge district court correctly held that Louisiana statutes providing for the punishment of persons who induce others to attend desegregated schools were invalid.

2. Whether the enforcement of a patently unconstitutional state criminal statute, which would inhibit the exercise of civil rights, may be enjoined.

3. Whether the Attorney General, at the request of a district court, may proceed to enjoin obstructions of federal court orders.

STATEMENT

1. This is another appeal arising out of the New Orleans school desegregation litigation. The underlying case started in 1952, and, as early as 1956, the district court ordered the desegregation of the Orleans Parish public schools. *Bush* v. *Orleans Parish School Board,* 138 F. Supp. 337 (E.D. La.), affirmed, 242 F. 2d 156 (C.A. 5), certiorari denied, 354 U.S. 921. After further protracted litigation, and following the failure of local authorities to comply with federal court decrees, the district court, on May 16, 1960, ordered desegregation to begin on a modest scale in September 1960. The deadline for desegregation was thereafter extended to November 1960, at which time some desegregation actually occurred.

2. Meanwhile, the Louisiana legislature had enacted a series of measures designed to interfere with the orders of the district court. In 1954, the legislature reenacted laws requiring public school segregation (Act No. 555). In 1956, it passed a group of acts purporting to freeze the existing racial status of the Orleans Parish schools and to reserve to the legislature the power of racial reclassification (Act No. 319). In 1958, the legislature passed statutes providing for the closing of schools under a desegregation order (Act No. 256). In its 1960 session, it enacted a large number of statutes to prevent compliance with the district court's desegregation order of May 16, 1960. Four of these measures—Acts Nos. 333, 495, 496, and 542—and the three earlier acts referred to above—were declared unconstitutional by a three-judge district court on August 27, 1960. *Bush* v.

Orleans Parish School Board, 187 F. Supp. 42 (E.D. La.), affirmed, 365 U.S. 569.

On November 14, 1960, the Orleans Parish School Board began good-faith compliance with the orders of the district court; four Negro first grade children began to attend two formerly white schools of the parish Before, during and since that date the Louisiana legislature has enacted and reenacted legislation in one extraordinary session after another, and the district court has found it necessary to act time and time again to enjoin the legislature's attempts to interfere with the desegregation order of that court. See *United States* v. *Louisiana,* 188 F. Supp. 916 (E.D. La.), stay denied, 364 U.S. 500, affirmed *sub nom. Orleans Parish School Board* v. *Bush,* 365 U.S. 569; *Bush* v. *Orleans Parish School Board,* 188 F. Supp. 916 (E.D. La.), affirmed, 365 U.S. 569; *Bush* v. *Orleans Parish School Board,* 190 F. Supp. 861 (E.D. La.), affirmed, 365 U.S. 569, and affirmed *sub nom. New Orleans* v. *Bush,* 366 U.S. 212; *Bush* v. *Orleans Parish School Board,* 191 F. Supp. 871 (E.D. La.), affirmed, June 19, 1961 (Nos. 868, 967, 1037, O.T. 1960).

3. On February 20, 1961, the legislature enacted Acts Nos. 3 and 5 of the Second Extraordinary Session of 1961. Act. No. 3, entitled "Bribery of parents of school children", provides for the prosecution and punishment of any person who offers anything of value to the parent or guardian of a school child as an inducement to encourage the parent or guardian to permit or cause the child to attend a public school "in violation of any law of this State",

or to reward the parent or guardian for permitting such attendance (Jur. St. App. 27–29). Act No. 5, entitled "Intimidation and interference in the operation of schools", provides for the prosecution and punishment of any person who offers to do, or does, any act to any public school child, parent, or guardian for the purpose of influencing, causing or rewarding the child, parent, or guardian, or any school teacher or other school employee, to do or perform any act "in violation of any law of this State"[1] (Jur. St. App. 30–32).

On March 17, 1961, the United States, pursuant to the district court's order granting it the right as *amicus curiae* to file pleadings, arguments, evidence, and briefs, moved to enjoin Acts Nos. 3 and 5. On April 21, 1961, the district court temporarily restrained Acts Nos. 3 and 5. On May 4, 1961, the court issued a temporary injunction prohibiting the enforcement of these statutes (Jur. St. App. 17–18; see Jur. St. App. 19–26 for the court's opinion).

ARGUMENT

1. Acts 3 and 5 do not specify what laws are involved in the phrase "any law of this State". But since the Louisiana state legislature considers, and has consistently considered, that its laws providing for public school segregation and other laws in violation of federal court orders are valid, there can be no doubt but that, by the phrase "any law of this State",

[1] Both statutes offer immunity from prosecution to those who will turn "informer," and they award to the informer the proceeds of any fine which the court may impose.

the legislature meant the unconstitutional requirement that the races attend separate schools.

In its past enactments, the Louisiana legislature has identified the attendance of a child at a school operated on a racially non-discriminatory basis in compliance with the Constitution of the United States as the single circumstance making school attendance "unlawful." In Acts Nos. 11, 12, 13, 14, 23, 24, 28 and 29 of the First Extraordinary Session of 1960, the Legislature used the descriptive phrase "not consistent with the Constitution and laws of the state, or State Board of Education policy, rules, or regulations", when referring to operation of schools on a racially non-segregated basis. At the same time, the legislature declared in Act No. 2 of the First Extraordinary Session that the decision of the United States Supreme Court in *Brown* v. *Board of Education*, 347 U.S. 483, was invalid and hence did not affect the law of Louisiana with respect to racial segregation in the public schools.[2] On November 10, 1960, the eight-member Legislative Committee, established by House Concurrent Resolution No. 10 of the First Extraordinary Session, adopted a resolution rescinding all action of the duly elected Orleans Parish School Board directed toward assignment of Negro students to formerly all-white schools. The stated ground for rescinding all Board action was that it was "not consistent with the constitution and laws of the State of Louisiana and the policy, rules and regulations of the State Board of Education."

[2] All of these legislative acts were struck down as unconstitutional efforts to enforce racial segregation in defiance of the prior court orders (see the Statement, *supra*, p. 3).

This resolution of the Committee was expressly approved and ratified by the Legislature in House Concurrent Resolution No. 18 of the First Extraordinary Session of 1960, and again ratified in Act No. 2 of the Second Extraordinary Session of 1960.

In light of the past history of the Louisiana legislature's attempts to thwart desegregation in the public schools of Orleans Parish, it seems clear that the district court correctly found that "in this instance, the Legislature has explained its meaning for all to hear. We need not probe the public mind to learn what was intended by 'the law of the State.' We have but to listen to its official voice to learn that 'the law of the State' is Louisiana legislatese for segregation" (Jur. St. App. 25).[3] The district court therefore correctly concluded that Acts Nos. 3 and 5 constituted an interference with the court's desegregation orders.[4]

This Court has already sustained injunctions by the district court against the efforts of the Louisiana legislature to withhold funds and supplies from de-

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[3] The district court's term "legislatese" is used in this quotation in place of the erroneous term "legislation" printed in the Appendix to Appellant's Jurisdictional Statement.

[4] The interference with desegregation orders is compounded in Act No. 5 by the breadth and vagueness of the statute. The specific type of conduct intended to be covered is not defined, and would apparently include any "act", however trivial or blameless. It would include the enrolling of a child in school, transporting him to or from school, helping him with his studies, or giving him or his parents any help or encouragement. Cf. *Winters* v. *New York*, 333 U.S. 507; *Cline* v. *Frink Dairy Co.*, 274 U.S. 445; *International Harvester Co.* v. *Kentucky*, 234 U.S. 216.

segregated schools,[5] to deny credits to students attending desegregated classes[6] and to revoke credentials of teachers who instruct desegregated classes.[7] It is respectfully submitted that the Court should do no less with respect to Acts 3 and 5, which permit criminal prosecution of persons giving help or encouragement to the families of children attending, or to teachers instructing, in schools operated in compliance with the desegregation order of the district court.

2. Appellants cite *Douglas* v. *City of Jeannette*, 319 U.S. 157, and other cases (Jur. St. 7–13), apparently for the application to this case of the familiar rule that "courts of equity do not ordinarily restrain criminal prosecutions." Aside from the obvious distinction here that a state criminal prosecution which has as its purpose and effect the frustration of the order of a federal court presents no ordinary situation, it is well settled that federal courts are empowered to enjoin, and have enjoined, the enforcement of state criminal statutes when the enforcement of such statutes would result in the denial of a citizen's civil rights. See *Evers* v. *Dwyer*,

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[5] Act No. 333 of 1960, enjoined in *Bush* v. *Orleans Parish School Board*, *supra*, 187 F. Supp. 42 (E.D. La.), affirmed, 365 U.S. 569; Acts Nos. 13 and 14, First Extraordinary Session 1960, enjoined in *Bush* v. *Orleans Parish School Board*, *supra*, 188 F. Supp. 916 (E.D. La.), affirmed, 365 U.S. 569.

[6] Act No. 24, First Extraordinary Session, 1960, enjoined in *Bush* v. *Orleans Parish School Board*, *supra*, 188 F. Supp. 916.

[7] Act No. 23, First Extraordinary Session, 1960, enjoined in *Bush* v. *Orleans Parish School Board*, *supra*, 188 F. Supp. 916.

358 U.S. 202; *Morrison* v. *Davis*, 252 F. 2d 102 (C.A. 5), certiorari denied, 356 U.S. 968; *Browder* v. *Gayle*, 142 F. Supp. 707 (M.D. Ala.), affirmed, 352 U.S. 903.[8]

In the recent case of *Crown Kosher Super Market* v. *Gallagher*, 176 F. Supp. 466 (D. Mass.), reversed on other grounds, 366 U.S. 617, this Court entertained an appeal on the merits without questioning the lower court's holding on the jurisdictional issue, which was substantially the same as that presented here, although that issue presented a threshold problem which, if decided against the plaintiffs, would have precluded consideration of the constitutional questions.

3. Appellants also question the right of the Department of Justice to appear as *amicus curiae* in the present suit (Jur. St. 5–6). In other phases of this same New Orleans school desegregation case, the right of the United States, as *amicus curiae*, to file pleadings and evidence was firmly established in situations substantially identical to that in the present suit. See *Bush* v. *Orleans Parish School Board*, 191 F. Supp. 871 (E.D. La.), affirmed, June 19, 1961 (Nos. 868, 967, 1037,

[8] These cases are not inapposite to the holding in *Douglas* v. *City of Jeannette*, *supra*, that, absent a showing of irreparable injury, the federal courts will not ordinarily interfere with state criminal law enforcement. This holding was qualified by the requirement that the criminal prosecution must be brought "in good faith." A state ordinance similar to the one challenged in the *Douglas* case had in fact been sustained against constitutional attack the year before in *Jones* v. *Opelika*, 316 U.S. 584. In the present case, however, the Attorney General of Louisiana openly admitted to the district court (see Jur. St. App. 22) that Acts 3 and 5 are probably invalid and urged abstention because a ruling striking them down can confidently be predicted from the Louisiana courts. Such a position would seem to negate the good faith of any possible prosecution.

O.T. 1960); *Bush* v. *Orleans Parish School Board*, 190 F. Supp. 861, affirmed, 365 U.S. 569, and affirmed *sub nom. New Orleans* v. *Bush*, 366 U.S. 212.[9]

CONCLUSION

For the foregoing reasons, we respectfully submit that the questions presented by appellants are clearly insubstantial and that the judgment of the district court should be affirmed.

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AUGUST 1961.

[9] Appellants' other contention (Jur. St. 6–7), that this suit is a prohibited "Suit Against the State of Louisiana" has also been set at rest by the latest decisions in the longstanding *Bush* case as well as by many other decisions in comparable cases.

U.S. GOVERNMENT PRINTING OFFICE: 1961